In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-996

LEWIS W. POE, *Petitioner,*

vs.

JOHN C. STETSON, Secretary of the Air Force, et al.,
Resopndents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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First, the petitioner was discharged *not* because of *actual* mental illness—but because of *false* and *fraudulent* Air Force *medical documentation* which *stated* that the petitioner was mentally ill.

The remainder of petitioner's reply will address the respondents' claim that "the petitioner made no concrete showing that relief through administrative channels is unavailable." Respondents' claim is inaccurate.

In support of petitioner's position, pages 4-8 of his Petition for Rehearing to the Ninth Circuit, dated August 1, 1977, are quoted below:

"Let's assume, *arguendo*, that this Court of Appeals is correct and that Poe could apply to the AFBCMR *for* declaratory relief (adjudication of constitutional issues), *assuming further* that the AFBCMR would extend the time limit for filing of Poe's application in the interest of justice, knowing full well that Poe is *not* filing his application for the correction of his military records nor for back pay. See 32 C.F.R. § 865.4 (1976).

According to 32 C.F.R. § 865.1, the purpose of the AFBCMR is to consider applications for the correction of military records. The AFBCMR *cannot* adjudicate the *constitutional* issues involved in this case. The relief requested is simply not within the power of the AFBCMR to grant. The AFBCMR is unable to grant adequate relief to Poe.

However, let's assume, *arguendo*, that the AFBCMR *at least* reinstated Poe in the Regular Air Force. But Poe *cannot* accept said reinstatement because the constitutional issue has not yet been resolved, and Poe will not place himself in a military situation again where military authorities can abuse their power, can violate their own regulations, and can do the same thing to Poe whenever they choose to—in utter disregard of their regulations and our Bill of Rights.

According to 32 C.F.R. § 865.2 et seq., following a hearing [assuming a hearing is granted—see *Rew* v. *Ward*, 402 F. Supp. 331, 335 (D. New Mexico 1975) and see 32 C.F.R. § 865.8 (1976)], the AFBCMR will make recommendations to the Secretary of the Air Force. Let's assume the AFBCMR recommends that Poe be reinstated as a Regular Captain in the Air Force. The Secretary has the final word in this matter. See 32 C.F.R. §§ 865.12 and 865.13; *Champagne* v. *Schlesinger*, 506 F.2d 979, 982-983 (7 Cir. 1974); *Horn* v. *Schlesinger*, 514 F.2d

549 (8 Cir. 1975). The Secretary of the Air Force will reject such a recommendation. Why? Because, on Dec. 17, 1976, the Formal Physical Evaluation Board recommended that Captain Poe be returned to active duty, and, on April 14, 1977, the Secretary ordered Poe separated from the Air Force because Poe "is physically unfit to perform the duties of his grade by reason of physical disability."

So Poe did *more* than "apply to the AFBCMR"—he followed the law and the instructions of the Department of the Air Force, and *eventually* went to *the Secretary* under whom the AFBCMR functions. See 10 U.S.C. § 1552; 32 C.F.R. § 856.1 et seq.; *Brownfield* v. *United States*, 148 Ct. Cl. 411, 414-415 (1960). Brownfield took his grievances *directly to* the Secretary of the Air Force and *sufficiently exhausted* his administrative remedies despite the fact that he did not appeal to the Board for the Correction of Military Records.

This Court of Appeals has stated that "No showing has been made that requiring such a step would be futile," and cited *Champagne, supra*. In *Champagne*, at page 983, the Seventh Circuit wrote, in part:

> "If plaintiffs are correct about the fruitlessness of an appeal to the BCNR, there is ample authority to support their contention that exhaustion is improper. • • • [Citations omitted.]
>
> • • •.
>
> Plaintiffs also argue that since the BCNR can only recommend action to the Secretary of the Navy and since the Secretary of the Navy's own Instruction clearly defines his view, further intraservice appeal is useless." [Footnote omitted.]

Poe is claiming *and has claimed* that an appeal to an administrative body, such as the AFBCMR, is futile. See pages 134, 138-139, 144, 146-147 of the record on appeal; see page 12 of the Brief of the Appellant; see pages 9 and 11 of the Brief in Reply. If the Ninth Circuit has overlooked or misunderstood the appellant's position in this case/complaint, I hope it is now clear that to appeal to the AFBCMR is a waste of time and will only delay the final adjudication of the constitutional issues. The "remedy" which was suggested by this Court of Appeals is not capable of affording full relief to the plaintiff. In the words of the Fifth Circuit,

> "* * *, the exhaustion doctrine in review of military discharge decisions is subject to limitation or exceptions. The most important of these is that only those remedies which provide a real opportunity for adequate relief need be exhausted. Stated somewhat differently, exhaustion is inapposite and unnecessary when resort to the administrative reviewing body would be futile." [Footnote omitted.] *Hodges* v. *Callaway*, 499 F.2d 417, 420 (5th Cir. 1974).

The full restoration of Poe's rights would be impossible for the AFBCMR to grant because Poe *was* deprived of his right to liberty *without* due process and *in violation of* the Air Force's own regulations. On pages 133-134 of the Record on Appeal, Poe wrote:

> "* * * the persistent utilization [by the plaintiff] of AF Reg 123-11, AF Reg 120-3, AF Reg 110-19 (see defendants' composite Exhibit No. 2) was a proximate cause of plaintiff's unlawful seizure, false arrest and imprisonment. Plaintiff is in court today because *he did* avail himself of Air Force procedures. So Mr. Eggers' statement that 'plaintiff has failed to avail himself' of these regulations is utterly absurd. As

stated previously, plaintiff is not asking and has not asked for a correction of his military records because that is not the real issue. The issue could be stated: Does the Constitution and laws of the United States guarantee the plaintiff a right to be free from unlawful seizure, unlawful arrest, the abuse and misuse of process, and the deprivation of his liberty without due process of law? If so, then this Complaint (Civil Action No. 76-0160) stands independently.

Furthermore, Mr. Eggers stated that if there is any validity to any of the claims set forth in the complaint, those issues may be resolved administratively and entirely moot the instant cause of action. Nothing could be further from the truth. Pray tell, what *administrative* body can legally decide the *constitutional* issues in this matter? Any attempted administrative procedure or 'remedy' would be wholly inadequate and futile."

Moreover, an Airman was *not* required to exhaust her administrative remedy before the AFBCMR before contesting her administrative discharge and suing in the U.S. District Court for the District of New Mexico. See *Rew* v. *Ward*, 402 F. Supp. 331 (D. N. Mex. 1975). In *Rew* v. *Ward*, District Judge Bratton wrote, in part, at p. 334:

> "When one scrutinizes the specific administrative system here involved, the Air Force Board for Correction of Military Records, in light of the foregoing policies, as *McKart* [*McKart* v. *United States*, 395 U.S. 185 (1969)] instructs the court to do, it becomes all too apparent that due to fiscal neglect and lack of legislative reform the BCMR is totally inept at handling with fairness questions such as those raised by the plaintiff herein."

At pp. 336-337:

> "Although the Secretary * * * has the authority to reinstate a former serviceman, * * * , Air Force policy is that reinstatement is not generally granted except * * *. (Footnote omitted.) No applicants have been reinstated in the Air Force for the last ten years.
>
> * * *.
>
> In light of the above description of the Air Force BCMR it can be said with conviction that: (1) for Airman Rew to seek relief by pursuing her administrative remedy would not only be expensive and time consuming but also totally useless; * * *. The men and women of our nation's Air Force deserve better treatment in return for their service.
>
> This court shares along with others the traditional judicial reluctance to interfere with the military establishment. However, this rule too has its limits as the court-martial (footnote omitted) and selective service cases well attest. The interference is minimized here because the litigation is postdischarge.
>
> * * *. But even assuming this decision will increase federal filings, at least until the military and Congress can respond with the creation of a more viable administrative remedy, *our federal courts cannot shirk from their constitutional and equitable duties* merely to retain a more manageable caseload." (Emphasis added.)

In *Sohm* v. *Fowler*, 365 F.2d 915, 918 (U.S. App. D.C. 1966), the D.C. Circuit wrote:

> "* * * it has evolved to the point where it can be formulated as a rule that the administrative remedy should be exhausted unless the party invoking the court's jurisdiction can demonstrate special circumstances. (Footnote omitted) * * *."

Poe claims that he has demonstrated special circumstances in this case."

Secondly, resort to the AFBCMR is a *permissive* remedy. See *Cason* v. *United States*, 200 Ct. Cl. 424, 432, 471 F.2d 1225 (1973); Glosser & Rosenberg, Military Correction Boards: Administrative Process and Review by the U.S. Court of Claims, 23 Am. U.L. Rev. 391 (1973). In *Mathis* v. *United States*, 183 Ct. Cl. 145, 147-148, 391 F.2d 938 (1968), the Court of Claims stated, in part:

> "We held in *Kirk* v. *United States, supra*, 164 Ct. Cl. at 742-43, that resort to the Discharge Review Board *is permissive, not mandatory*, and the same is true, *a fortiori*, of the Correction Board. Plaintiff had an Army board * * * in September 1960 before his separation, and *that was the only required* administrative remedy. (Footnote omitted.) * * *." [Emphasis supplied.]

Thirdly, Mr. Poe's *compliance* with Air Force regulations, "not perfection of an ABCMR appeal, marks the point where military administrative procedures have been exhausted. Department of Justice Memo No. 652 (Oct. 23, 1969)." *Parisi* v. *Davidson*, 405 U.S. 34, 38, 92 S. Ct. 815, 818 fn. 3 (1973).

Finally, the respondents cited 10 U.S.C. 1552 and *speciously* stated:

> "Whether or not the Air Force Board for the Correction of Military Records (AFBCMR) can 'adjudicate the constitutional issues involved' (Pet. 12), the AFBCMR has full power to correct any records that

erroneously indicate mental illness and to order petitioner's reinstatement with full restoration of rights. (footnote omitted) 10 U.S.C. 1552. Should the AFBCMR grant such relief judicial consideration of petitioner's constitutional claims would be unnecessary. (footnote omitted.)"

Moreover, the respondents did *not* even show that the AFBCMR had subject matter jurisdiction here. In fact, the AFBCMR does *not* have jurisdiction. (See paragraphs 1, 2, and 4 of AF Regulation 31-3(C3), dated 1 April 1977, Air Force Board for Correction of Military Records.) In examining the background and Congressional intent of Sections 207 and 131 of the Legislative Reorganization Act of 1946, we find that:

"These two sections must be read together. They evidence an intention of Congress to free itself from the burden of dealing with such matters by private bills * * *. Of the private acts heretofore passed which might conceivably be said to relate to the correction of military or naval records a large percentage have related to individuals who received discharges other than honorable. * * *.

* * *.

The correction of the record and the issuance of a new discharge may be regarded as acts of clemency, or in mitigation, *precisely comparable in effect* to a successful appeal *to the Congress* for relief *by private act*.

Section 207 is a remedial provision * * *. * * *, it should *not* be extended by construction so as to effect a result clearly beyond the purpose of the Congress. Furthermore, the words of the section, * * *, appear to afford an adequate means for in-

suring that the *application* of the section *is limited to* its *intended* scope as *a substitute* for relief by private acts.

* * *. Furthermore, section 207 is *not* to be regarded as superimposing a *further* means of review, freely available, upon the procedures previously set up. * * *." (Emphasis added.) 40 Op. Atty. Gen. 504 (1947).

Thus, the respondents—in asserting that Poe *must* take his complaint to the AFBCMR—are really declaring, *in theory and in effect*, that Poe *must* take his complaint to Congress (to ask for relief by private act).

Thus, *by existing law*, how does the AFBCMR acquire jurisdiction over the instant case, which is laden with constitutional issues?

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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March 21, 1978.